

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street,, in the City of New York, on the 30th day of August, two thousand and six.

PRESENT:

HON. DENNIS JACOBS,
HON. ROBERT D. SACK,
HON. BARRINGTON D. PARKER,
Circuit Judges.

Isa Gashi,
Petitioner,

-v.-

No. 05-2350-ag
NAC

Alberto R. Gonzales, Attorney General,
Respondent.

FOR PETITIONER: S. Gjoni, New York, New York.

FOR RESPONDENT: William J. Leone, United States Attorney, Mark S. Pestal,
Assistant United States Attorney, Denver, Colorado.

UPON DUE CONSIDERATION of this petition for review of the order of the Board of Immigration Appeals (“BIA”), IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the petition for review is DENIED.

Petitioner Isa Gashi petitions for review of an order of the BIA affirming Immigration

1 Judge (“IJ”) Annette S. Elstein’s decision ordering Gashi’s removal to Yugoslavia and denying
2 his applications for asylum, withholding of removal, and CAT relief. We assume the parties’
3 familiarity with the facts and procedural history of the case.

4 When the BIA agrees with the IJ’s conclusion and, without rejecting any of the IJ’s
5 grounds for decision, emphasizes particular aspects of that decision, this Court reviews both the
6 BIA’s and IJ’s opinions – or more precisely, the Court reviews the IJ’s decision including the
7 portions not explicitly discussed by the BIA. *Yun-Zui Guan v. Gonzales*, 432 F.3d 391, 394 (2d
8 Cir. 2005). The Court reviews questions of law *de novo*, including “what evidence will suffice to
9 carry any asylum applicant’s burden of proof.” *Islami v. Gonzales*, 412 F.3d 391, 396 (2d Cir.
10 2005). The Court reviews factual findings under the substantial evidence standard, treating them
11 as “conclusive unless any reasonable adjudicator would be compelled to conclude to the
12 contrary.” 8 U.S.C. § 1252(b)(4)(B); *see Zhou Yun Zhang v. INS*, 386 F.3d 66, 73 & n.7 (2d Cir.
13 2004).

14 A failure to corroborate may lead to a claim’s denial based on insufficiency of the
15 evidence. *See Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000). Before denying a claim for
16 failure to corroborate otherwise credible testimony, an IJ must first identify the particular pieces
17 of missing, relevant evidence, and show that this evidence was reasonably available to the
18 applicant. *See id.* at 289-90; *Jin Shui Qiu v. Ashcroft*, 329 F.3d 140, 153 (2d Cir. 2003); *cf. Xiao*
19 *Ji Chen*, 434 F.3d at 164 (explaining that this requirement of identification and availability is not
20 required where testimony is non-credible); *Zhou Yun Zhang*, 386 F.3d at 78 (same).

21 IJ Elstein’s insufficiency finding is supported by substantial evidence in the record.
22 Gashi failed to corroborate his account of persecution with any documents or background

1 information. He explained that the documentary proof of his membership in the Democratic
2 League of Kosovo, the medical records for his father, and his draft notice, had all been destroyed
3 when his family's house had been burned, and the credibility of his explanation was not
4 challenged. However, the IJ properly noted that the letter from Gashi's father did not include
5 "any statement about what's happened to [Gashi] and his family in the past, and what fears they
6 may have in the future." Gashi also failed to submit any evidence corroborating his assertions
7 that his father had been beaten, that his nephew had been killed, or that his home had been
8 burned. While Gashi's destroyed documents were justifiably unavailable, it was not
9 unreasonable for the IJ to expect that Gashi's father's statement, entered into evidence, would
10 mention the family's past persecution.

11 Furthermore, the IJ correctly noted that Gashi had not been present in Kosovo at the time
12 that his nephew had been killed, when his family had allegedly been driven from their home, or
13 when his father had been beaten. Gashi's application and testimony indicated that he had left
14 Kosovo in September 1998, but that the instances of persecution against his family had occurred
15 in 1999. The sequence of events indicate that, while Gashi may have left Kosovo due to other
16 instances of persecution, the impetus for his departure was not the persecution suffered by his
17 nephew, father, and family. The IJ's finding in this regard is, therefore, also supported by
18 substantial evidence.

19 The BIA has defined persecution as "a threat to the life or freedom of, or the infliction of
20 suffering or harm upon, those who differ in a way regarded as offensive." *Matter of Acosta*, 19 I.
21 & N. Dec. 211, 216 (BIA 1985). Gashi's refusal to join the Serb-dominated national army rises
22 to the level of past persecution. *See Islami*, 412 F.3d at 397. Gashi's assertions that Serbian

1 policemen had searched him, beat him “in front of other passengers,” and had taken his money,
2 and that the Serb military and police had attacked his village “killing [a] couple of [the] villagers
3 and destroying many houses,” may also constitute past persecution. *See Tian-Yong Chen v. INS*,
4 359 F.3d 121, 128 (2d Cir. 2004).

5 However, when a petitioner establishes that he has been persecuted in the past, “asylum
6 may be denied as a matter of discretion if there is little likelihood of present [or future]
7 persecution.” *Matter of Chen*, 20 I. & N. Dec. 16, 18 (BIA 1989). Accordingly, even if this
8 Court determines that Gashi demonstrated that he was the victim of past persecution, the changed
9 country conditions in Yugoslavia will rebut the presumption of future persecution.

10 In *Islami*, this Court determined that, because a Muslim and ethnic Albanian’s fear of
11 returning to Kosovo was not related to persecution from the Serbian national military, but instead
12 was based on his fears of general harassment from ethnic Albanians, the petitioner’s asylum
13 claim failed because his assertions of “past persecution and fear of future torment involve[d]
14 essentially different concerns,” and the Government had effectively rebutted the presumption of
15 future persecution by establishing through “copious evidence” that the Serb domination of
16 Kosovo had ended. *See Islami*, 412 F.3d at 398.

17 Here, Gashi alleged past persecution from the Serb military and police, but the letter from
18 his father and his testimony indicated that he fears future persecution from both the Serbian
19 police who could return to power and unidentified others. The IJ did not err in determining that
20 Gashi’s fear that the Serbian police would return, although they were no longer patrolling
21 Kosovo, constituted “speculation for which no basis ha[d] been established.” Indeed, none of the
22 documents or reports submitted into evidence indicated that the Serbian forces would resume

1 their domination of Kosovo. Furthermore, the IJ did not err in stating that the reports entered
2 into evidence indicate that any violence currently occurring in Kosovo stemmed from rivalries
3 among Albanians, and not Serbian authorities. Finally, the IJ did not clearly err in finding that
4 the return of Gashi's family to Kosovo mitigated the reasonableness of Gashi's fears of future
5 persecution.

6 Gashi's present argument – that he fears future persecution from the Kosovo Liberation
7 Army, due to his past affiliations with the group – was not raised before the IJ or the BIA, and,
8 therefore, is unexhausted. *See Gill v. INS*, 420 F.3d 82, 86 (2d Cir. 2005) (“§ 1252(d)(1) bars the
9 consideration of bases for relief that were not raised below, and of general issues that were not
10 raised below, but not of specific, subsidiary legal arguments, or arguments by extension, that
11 were not made below”).

12 In his brief to this Court, Gashi fails to challenge the IJ's and the BIA's denial of his
13 withholding of removal and CAT claims and his motion to terminate proceedings. Gashi has,
14 therefore, abandoned these challenges. *See Yueqing Zhang v. Gonzales*, 426 F.3d 540, 542 n.1,
15 546 n. 7 (2d Cir. 2005).

16 Accordingly, Gashi's petition for review is DENIED. Having completed our review, any
17 stay of removal that the Court previously granted in this petition is VACATED, and any pending
18 motion for a stay of removal in this petition is DENIED as moot. Any pending request for oral
19 argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure
20 34(a)(2), and Second Circuit Local Rule 34(d)(1).

21 FOR THE COURT:
22 Roseann B. MacKechnie, Clerk
23 By: _____